

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PRISCILLA C. RIVAS,

Plaintiff,

v.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF THE SOCIAL
SECURITY ADMINISTRATION,

Defendant.

No. C 23-03324 WHA

**ORDER GRANTING MOTION
TO DISMISS**

In this social security case, defendant moves to dismiss plaintiff's first amended complaint under Rules 12(b)(1) and 12(b)(6). For the following reasons, defendant's motion to dismiss is **GRANTED**.

Plaintiff's first amended complaint seeks judicial review of a May 2023 ALJ decision under Section 405(g) of the Social Security Act. But Section 405(g) provides for judicial review "after any final decision of the Commissioner of Social Security." And, failure to exhaust the procedures set out in Section 405(g) deprives the district court of jurisdiction. *Bass v. Soc. Sec. Admin.*, 872 F.2d 832, 833 (9th Cir. 1989). According to defendant, plaintiff pleads no final decision and, as such, there is no final decision subject to judicial review. This order agrees.

In an opposition brief and at the hearing (but in neither a declaration nor the first amended complaint), plaintiff's counsel emphasized that he had several phone conversations

1 with staff at the Appeals Council related to a request for review of the May 2023 ALJ decision
 2 (*see, e.g.*, Opp. Br. 2). Admittedly, this back-and-forth sounds exhausting, but it does not
 3 amount to exhaustion under Section 405(g). With the motion to dismiss, defendant proffered
 4 the testimony of Christianne Voegelé, Chief of Court Case Preparation and Review Branch 1
 5 of the Social Security Administration’s Office of Appellate Operations, in a declaration that
 6 stated there was no record indicating plaintiff had requested Appeals Council review (Dkt.
 7 No. 8-1). Plaintiff did not proffer any evidence to refute this proffered testimony.

8 At the end of the hearing, the judge requested a declaration that would get to the bottom
 9 of this. The agency then proffered additional testimony of Ms. Voegelé in a supplemental
 10 declaration that stated there was no record indicating plaintiff had requested Appeals Council
 11 review until October 23, 2023 (Dkt. No. 13). Apparently, plaintiff did request Appeals
 12 Council review of the May 2023 ALJ decision that day — the Monday after our Thursday
 13 hearing on the motion to dismiss (*ibid.*; *see also* Dkt. No. 12). It is undisputed that Appeals
 14 Council review of the May 2023 ALJ decision is now pending and that there is no final
 15 decision subject to judicial review. As such, this appeal should be dismissed for lack of
 16 subject-matter jurisdiction under Rule 12(b)(1). *See Duarte v. Saul*, No. C 20-00151 JCS,
 17 2021 WL 1516241, at *6 (N.D. Cal. Apr. 16, 2021) (Judge Joseph C. Spero), *aff’d sub nom.*
 18 *Duarte v. Kijakazi*, No. 21-16019, 2023 WL 2755329 (9th Cir. Apr. 3, 2023).*

19 Plaintiff suggests that, irrespective of the exhaustion issue, the case should proceed on
 20 her claims independent of her request for judicial review of a social security benefits
 21 determination, thereby avoiding dismissal (Opp. Br. 2–4). All the while, plaintiff continues to
 22 characterize her claims as seeking judicial review of a social security benefits determination

24 * To the extent that plaintiff is arguing the case should proceed despite a failure to exhaust, this
 25 order finds that plaintiff does not satisfy any of the factors that allow for waiver of the exhaustion
 26 requirement (*see* Opp. Br. 10). Exhaustion may be waived when a plaintiff satisfies a three-part
 27 test involving collaterality, irreparability, and futility. *See Bass*, 872 F.2d at 833. But, as
 28 defendant explains, “Plaintiff’s claim asks the Court to review the ALJ’s decision regarding the
 processing of Plaintiff’s request for expedited reinstatement of benefits and is thus not collateral,”
 “Plaintiff does not plead irreparable harm and, instead, admits that she *has* been reinstated,” and
 “exhaustion is not futile where, as here, an appeal would have permitted the agency to apply its
 expertise to interpret the agency’s implementing regulations and determine the jurisdictional issue
 raised” (Br. 7–8) (internal quotation and citations omitted).

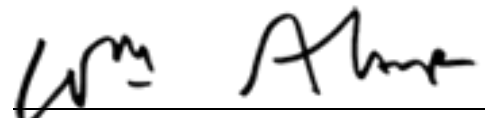
under Section 405(g), thereby requiring dismissal under Rule 12(b)(1) (*see* Reply Br. 1 (citing Opp. Br. 4, 8)). But even if the first amended complaint were construed to assert her claims separately from her request for judicial review of a social security benefits determination such that they were reviewable, these claims would not survive dismissal under Rule 12(b)(6). In brief, with respect to her claim under Section 504 of the Rehabilitation Act, plaintiff alleges no facts from which the judge could infer that she was denied a benefit of a Social Security Administration program solely by reason of her disability. With respect to her due process claim, plaintiff alleges no facts from which the judge could infer that the procedural safeguards available to her were insufficient. And, with respect to her “systemic disability abuse continuation” claim, plaintiff does not state under what authority her theory of liability lies.

Out of an abundance of caution, however, seeing that these claims could theoretically be asserted separately from a request for judicial review of a social security benefits determination, and with additional facts such that defects could theoretically be cured, dismissal is without prejudice to seeking leave to amend. By **DECEMBER 1, 2023, at NOON**, plaintiff may seek leave to amend her complaint by motion, noticed on a normal 35-day calendar. Any motion should affirmatively demonstrate how the proposed complaint corrects the deficiencies identified in this order, as well as all other deficiencies raised in defendant’s motion. It should be accompanied by a redlined copy of the proposed complaint showing proposed amendments. If plaintiff seeks leave to amend, she must plead her best case.

Lastly, plaintiff has filed an administrative motion for leave to file declarations in support of her exhaustion of the procedures set out in Section 405(g) (Dkt. No. 14). This order observes that the proffered evidence of phone calls and fax receipts does not demonstrate exhaustion of such procedures. But, for completeness of the record, this motion is **GRANTED**.

IT IS SO ORDERED.

Dated: November 17, 2023.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE